

THE WALL STREET JOURNAL THURSDAY, JUNE 4, 1987

Boland Laws May Be the Real 'Crime'

By L. GORDON CROVITZ

The White House has finally come around to the most important argument against the Boland amendments. This is that they not only didn't apply to the president or his staff at the National Security Council, but that any law that usurps the foreign-policy powers of the executive branch is unconstitutional. Edwin Meese told Bill Moyers on TV last week that it's a case for the Supreme Court if Congress passes a law that limits the president "in an unconstitutional manner from performing his duties under the Constitution."

President Reagan could have forced the issue by vetoing the amendments as they were passed. Failing this, his attorney general could have raised the constitutional questions at the beginning of the Iran-Contra affair. Instead, the separation-of-powers issue was raised by the administration belatedly and after already crippling its case.

The first confusion about the Boland amendments is sorting out what they said; the second is figuring out what they meant. There were five different Boland amendments, described alongside, which vacillated between support for the Contras and cutting them off. These amendments were inconsistent and vague, but did not offer any evidence that they applied to President Reagan. The reference in each Boland amendment is to intelligence agencies. The president is not mentioned.

A Vague Concept

The president's staff at the National Security Council is also not mentioned, but here the text is less clear. Boland 3, for example, refers to any "agency or entity of the United States involved in intelligence activities." Intelligence is a vague concept, and could include any agency that analyzes confidential security information. On the other hand, a 1981 Executive Order exempted the NSC from the list of intelligence agencies. All of the Boland amendments were passed as part of authorizations or appropriations for the CIA or Defense Department, not the NSC.

The confusion surrounding the text of the Boland amendments is why the White House is wise to make the fundamental, constitutional argument. This is that even if Congress had used clear language to restrict the president from soliciting funds from foreign countries or meeting with private Contra supporters, any such law would be unconstitutional. "There is a strong argument," chief of staff Howard Baker said, that Congress cannot "limit the president's authority under the Constitution to administer the foreign policy of this country."

This argument also should apply to the National Security Council. If the president has the constitutional power to solicit funds or rally private donors, it's untenable to say he must personally exercise these executive powers. He must be able to delegate to his own staff, in this case NSC officials. The NSC is part of the president's inner staff; its top officials are not subject to confirmation by the Senate or ongoing review by any committees of Congress. Robert McFarlane testified that he didn't know whether the Boland amendments legally applied to the NSC, but that he knew Congress didn't want aid for the Contras. However, political constraints are not the same as legal constraints.

Unfortunately for the White House, its constitutional case looks weaker for being raised so late in the day. Mr. Meese made a fateful statement in breaking the story on Nov. 25, 1986, of the Iran arms sales and diversion to the Contras. "We are presently looking into the legal aspects of it," he said.

nality involved." So, from the beginning the issue was "the law," not the constitutionality of these laws.

The better view is that any likely "crimes" are unconstitutional laws passed by Congress. Yet the White House implicitly accepted the validity of congressional

restraints on the president's foreign-affairs power. One result is the prosecutorial tone of the Iran-Contra hearings. Many congressmen seem more intent on helping lay the legal groundwork for special prosecutor Lawrence Walsh than on discussing the Iran initiative or what to do about the communist government in Nicaragua. Mr. Walsh has hinted of criminal charges against Lt. Col. Oliver North and others of conspiring to violate the Boland amendments, which carried no penalties, civil or criminal.

Why didn't President Reagan veto the Boland amendments as unconstitutional? Richard Nixon at least vetoed the War

Powers Resolution, but was overridden.

One reason is that each Boland amendment was attached to an authorization or appropriation bill. President Reagan doesn't have a line-item veto, so he would have had to risk closing down the defense and intelligence agencies until Congress tried to override.

Even now, sources at the White House are reluctant to talk on the record about how they viewed the Boland amendments when they were passed. They fear the legal repercussion that anything they say could lead to a subpoena by Mr. Walsh. Indeed, this chill is one of the big effects of turning what is essentially a policy dispute into possible criminal cases; not since the McCarthy era have internal communications been so stifled. What administration officials say off the record needs saying, however.

There certainly would have been a veto, these sources all agree, if anyone had been making the claims for the Boland amendments that are being made today. At the time of their passage, no one ever suggested they overrode the president's First Amendment rights when talking to the king of Saudi Arabia. Indeed, as the re-

peated changes in the Boland restrictions show, the whole five-year debate was about separation of powers, about how far Congress could go in restricting the executive's conduct of foreign policy.

The political compromise that arose from this struggle was that the executive would obey Congress's restrictions, but would continue to pursue its policy with whatever powers remained. The executive and the Congress bargained over what restrictions would be acceptable and signed, and which would be unacceptable and vetoed. Thus when the most restrictive Boland amendment was passed, the context of the debate established an implicit but

clear understanding: The president agreed not to veto, and the quid pro quo was leaving him the option of keeping the Contras alive by means other than overt U.S. funding.

There's abundant evidence in the legislative history that this is what everyone thought the amendments meant. Before the adoption of Boland 1 in late 1982, for example, several Democratic congressmen tried to amend the fiscal 1983 defense appropriations bill to bar all U.S. aid, through any channel, to the Contras. Rep. Tom Harkin (D., Iowa) proposed a bar on anyone "carrying out military activities in or against Nicaragua."

The White House sent word it would veto any such broad bill as an unconstitutional usurpation of executive authority in foreign policy. Rep. Boland wanted to avoid a political fight of this magnitude, so he himself fought off the bid for a total ban on aid. He pushed the vague language he had included in the intelligence authorization bill barring aid "for the purpose of overthrowing the government of Nicaragua." The compromise nature of this Boland amendment is shown by the fact that it passed the House by a vote of 411-0.

Whatever the Boland amendment meant, it did not try to ban all aid, as the Harkin amendment would have.

There's evidence that from the beginning, Congress was a willing participant in a covert policy. A heated debate broke out in the Senate Intelligence Committee in the spring of 1983 about whether Contra aid should be overt or covert. Covert won. Sen. Barry Goldwater (R., Ariz.) said that laws such as the War Powers Resolution "prohibit us from engaging in the type of overt action that we now call covert." This led to the surreal spectacle of public debate about "covert" aid.

There was also the issue of whether the purpose of the aid was to overthrow the regime in Managua, as in Boland 1, or to interdict aid to Salvador insurgents or to bring about negotiations between the communists and the Contras.

President Reagan was asked in a May 17, 1983, press conference why the U.S. didn't offer overt aid instead of covert aid to the Contras. "Why? Because we want to keep on obeying the laws of our country, which we are obeying." Congress not only knew that aid was being sent covertly, it made covert aid the only legal policy. The only way for the White House to avoid running afoul of micro-managing legislation was to keep the policy officially secret, though it was in reality very public.

Finally, it was no secret that private aid from domestic and foreign sources was keeping the Contras alive. In this context, a statement by a member of the House in a June 12, 1985, debate is noteworthy. He said the Contras "continue their military operations in Nicaragua and they have increased their numbers. They have done this with funds provided by private groups, mostly from the United States. . . private groups will continue to provide money for arms and ammunition." The speaker? Rep. Edward Boland.

Despite their current exclamations of surprise, congressmen knew from speeches and rallies that the executive branch was doing what it could for the Contras. This situation did, however, lead to some tightrope walking. Mr. McFarlane told the Iran-Contra panel that when he had earlier testified to a House committee about the level of assistance to the Contras that he "used some tortured language" and may have been "too categorical." Langhorne Motley, then the assistant secretary of state for Central America, told a Senate committee in 1985 that there was no soliciting or encouraging of aid from third countries. What is not clear is whether, given their tacit support for covert aid, any congressmen expected answers different from the ones they got.

Reagan Should Have Fought Back

Still, the implicit agreement that the president would keep the Contras alive until Congress began funding them again broke down in the glare of publicity. In retrospect, the greatest failure of President Reagan in the Iran-Contra affair was ducking his duty to himself and future presidents to fight back when Congress first began usurping executive authority. Even Boland 1 is of dubious constitutionality. Now the separation-of-powers issue will most likely be settled by a court hearing claims brought by special prosecutor Walsh. An obvious defense for an indicted Iran-Contra participant is that the Boland amendments were unconstitutional.

In light of Congress's muddling meddling in Nicaragua policy, it's worth recalling that one reason a constitutional convention was called 200 years ago was that the Articles of Confederation had a fatal flaw. They gave the foreign-affairs power to Congress. With policies led to and fro by dozens of commanders in chief, the country, threatened by continued British aggression, feared for its independence.

Mr. Crovitz is assistant editor of the Journal's editorial page.

There certainly would have been a veto, these sources all agree, if anyone had been making the claims for the Boland amendments that are being made today.

The Five Amendments

These were the amendments supported by House Intelligence Committee Chairman Edward Boland (D., Mass.) to limit funding for the Contras:

Boland 1. Dec. 21, 1982, to Dec. 7, 1983. Defense Appropriation Act: No funds can be used by the Defense Department or Central Intelligence Agency "to furnish military equipment, military training or advice . . . for the purpose of overthrowing the government of Nicaragua or provoking a military exchange between Nicaragua and Honduras."

Boland 2. Dec. 8, 1983, to Oct. 21, 1984. Defense Appropriations and Intelligence Authorization Acts: Granted \$24 million for use by Defense, the CIA or other intelligence agencies for "supporting, directly or indirectly, military or paramilitary operations in Nicaragua."

Boland 3. Oct. 3, 1984, to Sept. 30, 1985. Defense Appropriation and Intelligence Authorization Acts: "During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual."

Boland 4. Aug. 8, 1985, to March 31, 1986. International Security and Development Cooperation Act: Appropriated \$27 million for humanitarian assistance to the Contras via the State Department.

It prohibited the U.S. government from entering "into any arrangement conditioning, expressly or impliedly, the provision of assistance by a recipient to persons or groups engaging in an insurgency or other act of rebellion." Supplemental Appropriations Act: Granted exception from any prohibitions on the U.S. government "exchanging information with the Nicaraguan democratic resistance."

Boland 5. Dec. 4, 1985, to Oct. 17, 1986. Intelligence Authorization Act: Authorized secret direct military and paramilitary aid to the Contras. The details were classified as national secrets, but the conference managers for the bill explained that the act authorized a classified amount for communications and equipment training. It also authorized intelligence agencies to help the Contras with intelligence and counterintelligence advice and information and communications training, but assistance (except for communications training) could not amount to "planning or execution of military or paramilitary operations in Nicaragua" or "participation in logistics activities integral to such activities." It repealed the prohibition on indirect military or paramilitary aid, and expressly authorized the State Department to solicit third country humanitarian aid.

Bolands 1-5 expired. On June 26, 1986, the House voted 221-209 to join the Senate in approving \$100 million in aid for the Contras. Of this, \$70 million was for military aid, \$20 million for humanitarian aid.